UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

GALAXY TOWERS CONDOMINIUM ASSOCIATION

Respondent

and Case No. 22-CA-030064

LOCAL 124, RECYCLING, AIRPORT, INDUSTRIAL & SERVICE EMPLOYEES UNION

Charging Party

RESPONDENT'S BRIEF IN SUPPORT OF ITS MOTION FOR JUDICIAL NOTICE OF THE NOVEMBER 28, 2012 OPINION OF UNITED STATES DISTRICT JUDGE WILLIAM J. MARTINI IN *GALAXY TOWERS CONDOMINIUM ASSOCIATION V. LOCAL 124 I.U.J.A.T.* AND TO APPLY JUDICIAL ESTOPPEL TO THE MAINTENANCE OF INCONSISTENT LEGAL POSITIONS BY THE GC AND UNION

Submitted by:

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I. ARGUMENT

Respondent Galaxy Towers Condominium Association ("GTCA"), through its undersigned counsel, submits this Brief in Support of its Motion requesting that the National Labor Relations Board ("NLRB" or "Board") take judicial notice of the November 28, 2012 Opinion of United States District Judge William J. Martini in *Galaxy Towers Condominium Association v. Local 124 I.U.J.A.T.*, Civil Action No.: 2:11-cv-04726 (WJM) ("the Opinion").[1] Further, GTCA requests that the Board apply the doctrine of judicial estoppel against the Counsel for the Acting General Counsel ("GC") and the Charging Party Local 124, Recycling, Airport, Industrial & Service Employees Union ("Union").

A. The Board Should Take Judicial Notice of a Federal Court Decision Which Made Specific Factual Findings on an Issue Material to the Present Case.

The National Labor Relations Act ("NLRA" or "Act") and Board's Rules and Regulations govern the circumstances under which the Board should take judicial notice of an adjudicative fact. Section 10(b) of the Act provides, in relevant part that "[a]ny such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States. . . ." 29 U.S.C. §160(b). Similarly, Section 102.39 of the Rules and Regulations provides that "[a]ny such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States. . . ."

Federal Rule of Evidence 201 governs the circumstances under which a tribunal will take judicial notice of adjudicative facts. *See* Fed. R. Evid. 201. This Rule requires that "[a] court shall take judicial notice if requested by a party and supplied with the necessary information." Fed.R.Evid. 201(d). A judicially noticed fact "must be one not subject to reasonable dispute in

[1] A copy of the Opinion is attached as Exhibit A to GTCA's Motion.

that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed.R.Evid. 201(b). A tribunal may take judicial notice of a fact at any stage of the proceedings, including appeal. *In re Indian Palms Assoc.*, 61 F.3d 197, 205 (3d Cir. 1995) ("Judicial notice may be taken at any stage of the proceeding . . . including on appeal . . . as long as it is not unfair to a party to do so and does not undermine the trial court's factfinding authority.") (citations omitted). Further, a tribunal may take judicial notice of relevant decisions issued by other courts or administrative agencies. *Opoka v. I.N.S.*, 94 F.3d 392, 394 (7th Cir. 1996) ("This court, however, has the power, indeed the obligation, to take judicial notice of the relevant decisions of courts and administrative agencies, whether made before or after the decision under review. Determinations to be judicially noticed include proceeding[s] in other courts, both within and outside the federal system, if the proceedings have a direct relation to matters at issue.") (internal quotation marks and citations omitted).

Based on the forgoing authorities, the Board is required to take judicial notice of Judge Martini's Opinion and, in particular, his finding therein that the collective bargaining agreement ("CBA") between GTCA and the Union contained specific grievance and arbitration language. *See* Opinion at 1, citing Affidavit of Union Secretary-Treasurer James Bernardone ("Bernardone Aff.") ("Article 15, Section 4 of the CBA provided that, if a grievance arose between [GTCA] and an employee, ['']the Union and the Employer may request that the matter be submitted to arbitration before Elliott Schriftman, Eugene Coughlin or Robert Hertzog on a rotating basis['']")[2]

The Opinion is relevant to this case because both the GC and the Union have argued that

[2] The Bernardone Aff. is in the record of this case at R Ex. 29.

the Memorandum of Agreement ("MOA") signed by the bargaining parties in early January 2007 incorporated only economic terms that the parties had previously agreed to, while leaving non-economic terms, such as the parties' tentative agreement ("TA") on subcontracting in dispute herein and on the grievance and arbitration language found to be part of the CBA by Judge Martini, to be implemented only as part of a "complete" CBA. GTCA, on the other hand, has maintained that the MOA included all economic and non-economic TAs reached before the execution of the MOA. GTCA has further contended that because the MOA incorporated the TA relating to subcontracting, GTCA was legally privileged to subcontract the bargaining unit work at issue in this case. Administrative Law Judge Steven Davis ("ALJ") agreed with GTCA's position in his September 25, 2012 decision ("ALJD"), wherein he held that GTCA did not violate the Act by subcontracting unit work. (ALJD at 20. ll. 18-25).

In the federal court case, the Union argued – and Judge Martini found – that the bargaining parties' CBA did include non-economic terms. Specifically, Judge Martini found that the CBA included the grievance and arbitration language quoted above. Further, Judge Martini relied on an Exhibit to the Bernardone Aff., containing an excerpt of the March 13, 2007 draft CBA, in reaching this conclusion. Opinion at 1, 3 (citing Bernardone Aff. Ex. A). The page of this Exhibit containing the grievance and arbitration language, page 17, also includes the subcontracting language at issue in this case.[3]

The GC and Union cannot have it both ways – the Union cannot seek to enforce non-economic TAs in the federal court case and then argue before the Board, with the GC's assistance,

[3] Exhibit A to the Bernardone Aff. is excerpted from GC Ex. 12, the March 13, 2007 draft CBA prepared by GTCA's then-counsel, Steven Ploscowe.

that those non-economic TAs are not binding. The grievance and arbitration language found to be enforceable by Judge Martini was not part of the August 15, 2006 "Interim Agreement" signed by the bargaining parties, nor was it part of the CBA between GTCA and the Union's predecessor, Local 734 L.I.U. of N.A., AFL-CIO ("Local 734").[4] Further, the MOA did not specifically adopt the grievance and arbitration language found by Judge Martini to be part of the bargaining parties' CBA. (*See* GC Ex. 11). Nevertheless, the Union argued in the federal case that this non-economic TA had contractual force; and Judge Martini agreed.

There is no distinction between the non-economic TA relating to arbitration that the Union successfully enforced in the federal case and the non-economic TA relating to subcontracting that both the Union and the GC seek to run away from in this case. Further, there is no principled basis on which these two non-economic TAs can be distinguished.

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[4] The "Interim Agreement" provided that, pending "remaining negotiations and a final agreement", the bargaining parties agreed to the "grievance/arbitration provisions as proposed by the Union shall be instituted on the interim basis. . . ." (GC Ex. 4). The Union's "grievance/arbitration provisions as proposed" provided:

> Section 4. If the grievance is not settled as a result of the foregoing, the Union or the Employer may request that the matter be submitted to arbitration before Mr. _____ or Mr. _____ on a rotating basis. Any request for arbitration must be made within ten (10) working days from the final decisions of the general manager. The decision of the arbitrator shall be final and binding on all parties. No strike or lockout shall be permitted while a grievance is being negotiated for settlement or until the arbitration proceedings have been concluded. The cost of such arbitration shall be borne equally between the parties.

B. The Board Should Apply the Doctrine of Judicial Estoppel and Preclude the GC and Union From Asserting a Legal Position Completely Divergent From That Asserted in a Separate Federal Court Proceeding.

GTCA requests that the NLRB apply the doctrine of judicial estoppel against the GC and the Union in the same manner as a federal court would under the present circumstances. "Judicial estoppel is an equitable doctrine invoked at a court's discretion." *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1285 (11th Cir. 2002) (citing *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001)). Judicial estoppel is designed to protect the integrity of the judicial process. *Reynolds v. Commissioner of Internal Revenue*, 861 F.2d 469, 472-73 (6th Cir. 1988) (internal citations and quotations omitted) (the doctrine has been characterized as "a rule against playing fast and loose with the courts, blowing hot and cold as the occasion demands, or having one's cake and eating it too."); *In re Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990) ("Judicial estoppel is a doctrine intended to prevent the perversion of the judicial process."); *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982) (judicial estoppel "protect[s] the essential integrity of the judicial process"); *Scarano v. Central R. Co. of New Jersey*, 203 F.2d 510, 513 (3d Cir. 1953) (judicial estoppel prevents parties from "playing 'fast and loose with the courts'"); *see also* Wright and Miller, 18B Fed. Prac. & Proc. Juris. § 4477 (2d ed.) (citing *In re Chambers Devel. Co.*, 148 F.3d 214, 229 (3d Cir. 1998)) (judicial estoppel is sometimes referred to as the "doctrine of inconsistent positions"). The purpose of the doctrine is to "prevent[] a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding." *New Hampshire*, 532 U.S. at 749 (internal quotations omitted).

Although there are no "inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel," the Supreme Court has elucidated several factors which

typically inform the decision whether or not to apply judicial estoppel in a particular case. *Id*. at 751. "First, a party's later position must be 'clearly inconsistent' with its earlier position." *Id*. at 750. The Union's position (and the GC's coordinated advocacy on behalf of the Union) on the status of non-economic TAs in this case is clearly inconsistent with the position taken on the same issue in the federal case.

"Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled. . . .'" *Id*. This factor is met, as the Union clearly succeeded in convincing Judge Martini that non-economic TAs, such as that relating to grievances and arbitration, were part of the CBA between the bargaining parties. Furthermore, in reaching that conclusion, Judge Martini specifically relied on the Bernardone Aff., a document made by a Union officer and witness in this case.

"[T]hird . . . is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id*. at 751. Here, if the Union, through the GC's agency, is permitted to claim inconsistently that the non-economic TA relating to subcontracting was not part of the bargaining parties' CBA, then GTCA potentially will be subjected to the unfair detriment of being found to have improperly subcontracted bargaining unit work, accompanied by a very large back pay award. The Board cannot countenance the Union's blatant attempt to "game the system."

For these reasons, the Board should apply the doctrine of judicial estoppel and not permit the GC and the Union to maintain blatantly inconsistent legal positions and diminish the integrity of this process.

II. CONCLUSION

Upon proper notice, the Board is required to take judicial notice of Judge Martini's Opinion. *See* Fed. R. Evid. 201(d) ("A court shall take judicial notice if requested by a party and supplied with the necessary information"). Here, GTCA has requested judicial notice and furnished the Board with the necessary information. Accordingly, for the foregoing reasons, GTCA respectfully requests that the Board take judicial notice of the Opinion, attached to GTCA's Motion as Exhibit A, and submitted in support of GTCA's contention that the Board should affirm the ALJ's conclusion that GTCA did not violate the Act by subcontracting bargaining unit work on August 1, 2011. Furthermore, GTCA respectfully requests that the Board apply the doctrine of judicial estoppel to prevent the GC and the Union from advancing a position inconsistent with that taken by the Union in the related federal court litigation.

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Respectfully submitted,

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